

STATE OF MICHIGAN
COURT OF APPEALS

REGINA OSBORNE,

Plaintiff-Appellee,

v

CITY OF PONTIAC,

Defendant-Appellant.

UNPUBLISHED

March 9, 2010

No. 289313

Oakland Circuit Court

LC No. 2007-086702-NO

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for summary disposition based on governmental immunity. See MCR 2.116(C)(7). We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On August 21, 2007, plaintiff was injured when she was riding her bicycle and hit a pothole on Carriage Circle in Pontiac. Plaintiff sued defendant under the highway exception to governmental immunity on October 19, 2007, but never sent a separate notice of the incident. At issue here is whether the complaint provided sufficient notice to defendant.

MCL 691.1404 provides, in relevant part:

(1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) [dealing with minors and persons incapable of giving notice] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. *The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.*

(2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding [Emphasis added.]

The complaint identified the location of the defect as “on Carriage Circle” “at or near the intersection of Auburn Road” in the City of Pontiac. The nature of the defect was identified as “uneven/unlevel/crumbling concrete, and/or improperly patched repairs.” The injury sustained was well-described; this element is not at issue. No witnesses were identified at all, despite the fact that there were indeed known witnesses.

After 120 days had passed since the accident, defendant moved for summary disposition, arguing that notice must be given *before* the lawsuit is commenced; i.e., the complaint itself cannot serve as the notice required by MCL 691.1404. Defendant asserted that even if the complaint could serve as notice, plaintiff’s complaint did not contain all the necessary elements because she did not identify the exact location of the defect or name any witnesses known at the time. Plaintiff countered that neither the statute nor case law requires notice to be separate from the complaint or to be sent before the complaint is filed. She also asserted that she sufficiently described the location of the defect and that, although she did not name known witnesses, she substantially complied with the requirements of MCL 691.1404, and that was sufficient.

The trial court found that the complaint could serve as notice and that it was adequate despite not naming witnesses because “the motive behind the statute [is] to prevent future injuries, not as a precondition to a lawsuit or a potential Summary Disposition motion for defendant.”

We review de novo a trial court’s decision to grant or deny a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Statutory interpretation is a question of law that we also consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

We agree with defendant that plaintiff’s complaint lacked required elements and therefore was not sufficient to provide the notice required by the statute. Plaintiff correctly notes that there is case law holding that, in general, substantial compliance may be sufficient to satisfy a statutory notice provision. See *Meredith v Melvindale*, 381 Mich 572, 579-580; 165 NW2d 7 (1969), and *Mullas v Secretary of State*, 32 Mich App 693, 697-698; 189 NW2d 141 (1971). Although these cases have not been expressly overruled, in 2007, our Supreme Court issued *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007), in which it stated that, at least with regard to the highway exception to governmental immunity, there must be strict compliance with the conditions and restrictions of the statute. Since then, cases construing the highway exception have strictly adhered to the letter of the statute, and this Court remains bound by *Rowland*’s insistence on strict compliance with the statutory requirements. In *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009), this Court held that the first notice sent by the plaintiff “*did not comply with the requirements* set forth in MCL 691.1404(1) because plaintiff did not disclose the name of a known witness” (emphasis added). Thus, the complaint in the present case also does not comply with the statutory requirements.¹

¹ Unlike in *Burise*, 282 Mich App at 652, plaintiff here did not cure the defect in notice within the 120-day notice period.

Moreover, the cases cited by plaintiff as allowing mere “substantial compliance” are distinguishable. Those cases involve facts where the plaintiff attempted to provide the required information but arguably did so inadequately, or where there was no evidence that the plaintiff knew of witnesses at the time. Here, plaintiff completely omitted one of the requirements for no apparent reason, despite the information being available to her well before the filing of the complaint. This makes her argument about “substantial compliance” weak, and considerably without case support, even if we were to find we could ignore the statutory requirement.²

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray

² Given our holding, it is unnecessary to address the issue regarding whether plaintiff was required to provide notice separately from her timely-filed complaint.